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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 625

THE UNITED STATES, PETITIONER

v.

HAZEL L. FAUBER, ADMINISTRATRIX, C.T.A.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CLAIMS**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on December 6, 1948.

OPINIONS BELOW

The opinions of the Court of Claims (R. 55, 85) are reported at 93 Ct. Cls. 11 and 81 F. Supp. 218.

JURISDICTION

The judgment of the Court of Claims was entered on December 6, 1948 (R. 91). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether, under a statutory authorization to sue for "reasonable and entire compensation" (35 U. S. C. 68), a patent owner's recovery from the United States for the unauthorized use of his invention may, in addition to a reasonable royalty, include as a part of his compensation an award of interest dating from the time of infringement.

STATUTES INVOLVED

28 U. S. C. 2516(a) provides:

§ 2516. Interest on claims and judgments

(a) Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof.

The Act of June 25, 1910, 36 Stat. 851, as amended by the Act of July 1, 1918, 40 Stat. 705 (35 U.S.C. 68) provides:

whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: *Provided, however,* That said Court of Claims shall not entertain a suit or award compensation under the provisions of this section where the claim for

compensation is based on the use or manufacture by or for the United States of any article heretofore owned, leased, used by, or in the possession of the United States: *Provided, further*, That in any such suit the United States may avail itself of any and all defenses, general or special, that might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise; *And provided further*, That the benefits of this Act shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee; nor shall this section apply to any device discovered or invented by such employee during the time of his employment or service.

STATEMENT

This action was brought on April 26, 1932, pursuant to a special act of Congress waiving periods of limitation (46 Stat. 2134), to recover compensation under the Act of June 25, 1910, as amended July 1, 1918 (36 Stat. 851, 40 Stat. 705, 35 U. S. C. 68, *supra*), for the alleged infringement by the United States, from 1912 to 1929, of numerous inventions claimed in two patents (R. 1-6). Pursuant to Rule 39 of the Rules of the Court of Claims, the first hearing related only to the questions of the validity and infringement of the claims made; the question of the amount of recovery was reserved for later determination (R. 13, 74). All of plaintiff's nine claims under the patents, except one,

were held either invalid or not infringed, in a judgment entered March 31, 1941 (R. 72). On the Government's motion of July 1, 1942, the case was held in an inactive status because of the war until November 16, 1945 (R. 77). In the subsequent proceeding to determine the reasonable and entire compensation for the single claim held to be valid and infringed, the court awarded judgment on December 6, 1948, for \$88,686 as a reasonable royalty "together with an additional amount, as part of entire or just compensation, measured by a reasonable rate of interest of 4% per annum" on the annual amounts computed to be owing as reasonable royalties for the years 1917 through 1929 (R. 91, 86).

The patents in question were issued to William H. Fauber in 1910 and 1912 (R. 12). In this action brought by the administratrix of his estate, it was contended that inventions disclosed in these patents were used by the United States in the construction of certain hydroairplanes (R. 12). Both patents relate to the hull construction of "hydroplane boats" which are so constructed as to receive support when in motion from the dynamic reaction of the water upon surfaces or "hydroplanes" (R. 13). The effect of the reaction is to reduce resistance by raising the hull partly out of the water, which causes the boat to plane on the surface of the water and facilitates the attainment of high speeds (R. 13). The claims under these patents relate principally to a boat having a bottom formed

of a series of V-shaped hydroplane surfaces in stepped relation from fore to aft (R. 21-22, 63-64). The only difference significant here between the first and second patents is that the latter discloses a bottom in which each rear hydroplane surface has a flatter V form than the forward hydroplane surface (R. 64-65).

The alleged infringing structures were all limited to various forms of hull construction utilized in seaplanes and flying boats in which the hull or pontoon member of the airplane was found by the Court of Claims to possess the characteristics and functions of a boat while maneuvering on the surface of the water (R. 13, 63). It appears that Mr. Fauber first presented his claim to the Navy Department for the use of his inventions in August 1917, and frequently advanced his claim from that time until March 1928 (R. 60). From the outset, the Navy Department was of the opinion that the questions of infringement and validity of these patents were so controversial in nature as to require a judicial determination before an expenditure of government funds would be justified (R. 60). Accordingly, Mr. Fauber was repeatedly given to understand that he could not look to the Secretary of the Navy for the settlement of his claim and he was advised of his possible remedy in the Court of Claims (R. 59-60). A claim made to the War Department was also denied and he was again advised of the possibility of resort to the Court of Claims (R. 61). As previously indicated, the present action was not instituted until April 26, 1932, pursuant to

a special act of March 3, 1931 (46 Stat. 2134) conferring jurisdiction on the Court of Claims to hear the claim under the Act of June 25, 1910, as amended, "notwithstanding the lapse of time or the statute of limitations" (R. 12). No reason appears for this delay of 15 years in institution of suit. See H. Rep. No. 2450 and S. Rep. No. 1770, 71st Cong., 3d sess. The special statute contained no provision for the payment of interest on the claim (R. 12-13).

In the first proceeding, dealing with the questions of validity and infringement, four claims based on the first patent and three based on the second were held invalid as disclosed in the prior art (R. 55, 65). Two claims of the second patent were held valid but only one was held to have been infringed (R. 55, 65). All the claims related in general to various formations of V-shaped hydroplane surfaces (R. 63). The valid claims related to a structure embodying a V-type stepped hydroplane surface bottom in which the V-shape of the rear hydroplane was flatter than the V of the forward hydroplane (R. 53-54). The terminology of one of these valid claims was held applicable to the hulls of several hydroplanes constructed by the Government and the plaintiff was held entitled to recover compensation for the unauthorized use by the United States of the invention disclosed in this claim (R. 54, 55).

In the proceeding for the determination of the reasonable and entire compensation due for infringement of the single claim under the second

patent, the Court of Claims found that hydroairplane hulls embodying the valid claim were constructed by the Government from 1917 through April 30, 1929, the date of the patent's expiration (R. 74, 79). Taking into account a variety of factors, the Court of Claims reached the conclusion that a fair and reasonable royalty upon which to base compensation was $1\frac{1}{2}\%$ of the cost per hull (R. 84). Setting forth in tabular form the total cost of hull construction for each year from 1917 through 1929 and the reasonable royalty computed at $1\frac{1}{2}\%$ of this cost, the Court of Claims found the total reasonable royalty to amount to \$88,686 (R. 84).

Although neither the percentage figure nor the amount of the reasonable royalty was fixed by the court until December 6, 1948, the court found that reasonable and entire compensation consisted of this computed reasonable royalty "together with an additional amount measured by a reasonable rate of interest at 4% per annum on the individual amounts" designated in the table for each year from 1917 through 1929 (R. 85). The interest was to be computed, beginning January 1, 1918, from January 1 of each year following the year of infringement to the date of payment of the judgment (R. 85). The interest alone would exceed \$100,000, more than the award of reasonable royalties. This additional amount was "allowed not as interest but as a part of entire and just compensation", in reliance upon *Waite v. United States*, 282 U. S. 508 (R. 85, 86, 90).

SPECIFICATION OF ERROR TO BE URGED

The Court of Claims erred in including in the judgment against the United States as a part of reasonable and entire compensation, interest, computed from the dates of infringement, on the reasonable royalty fixed by the court as the proper measure of damages.

REASONS FOR GRANTING THE WRIT

The instant case is one of a long series of decisions in which the Court of Claims has construed the statute authorizing a patent owner to sue the United States for "his reasonable and entire compensation" for the unauthorized use by the United States of patented inventions (35 U. S. C. 68), as requiring the Government to pay interest from the time of infringement upon a subsequently determined reasonable royalty. (See Point 3, *infra*.) We believe the decision should be reviewed and corrected by this Court because, without any evidence of such a congressional purpose, it imposes upon the Government a greater liability for patent infringement than the law places upon a private infringer. Moreover, the decision must be deemed to contravene the statutory prohibition against the allowance of interest on claims against the United States, especially in the light of the recent decisions of this Court which hold the prohibition applicable unless specifically waived by the express language of a statute or contract.

1. The inclusion by the Court of Claims, in a judgment for "reasonable and entire compensa-

tion", of an additional amount measured by interest for a period before the claim has been liquidated requires the Government to pay greater compensation for infringement than the patent owner could recover from a private infringer. Since the statute authorizing suit against the United States for the unauthorized use of patented inventions contains no suggestion that such a result was intended, we believe the allowance of interest is plainly erroneous.

a. The decisions of this Court clearly establish that under the general rule of damages in patent infringement cases interest does not begin to run until the damages have been liquidated. *Duplate Corp. v. Triplex Co.*, 298 U. S. 448, 459; *Crosby Valve Co. v. Safety Valve Co.*, 141 U. S. 441, 457; *Tilghman v. Proctor*, 125 U. S. 136, 160, 161; *Mowry v. Whitney*, 14 Wall. 620, 653. This has long been the rule, and any doubts that may reasonably have existed with respect to its applicability to a case like the present one, involving damages based upon a reasonable royalty, were dispelled in *Duplate Corp. v. Triplex*, *supra*, decided in 1936. It is the clear holding of the *Duplate* decision that, in the absence of exceptional circumstances, "an award of damages upon the basis of a reasonable royalty" should bear interest "from the date when the damages are liquidated, and not, as by the present decree, from the date of the last infringement" (p. 459). The rule announced in the *Duplate* case has been consistently applied by the federal courts, in patent infringement cases dealing with the award

of reasonable royalties, to preclude the allowance of interest for any period before damages have been liquidated.¹ See, *e. g.*, *Reynolds Spring Co. v. L.A. Young Industries*, 101 F. 2d 257, 262 (C. A. 6); *Dixie Cup Co. v. Paper Container Mfg. Co.*, 169 F. 2d 645 (C. A. 7); *Enterprise Mfg. Co. v. Shakespeare Co.*, 141 F. 2d 916, 921 (C. A. 6); *General Motors Corporation v. Dailey*, 93 F. 2d 938, 942 (C. A. 6) *Wedge v. Waynesboro Nurseries*, 31 F. Supp. 638, 642, 645 (W. D. Va.); *Kaltenbach v. Chesapeake & Ohio Ry. Co.*, 43 F. Supp. 819, 820 (E. D. Va.); *cf. Clair v. Kastar, Inc.*, 70 F. Supp. 484, 492 (S. D. N. Y.). Thus, unless the Act of June 25, 1910 (as amended) defines the liability of the United States in broader terms than that of a private infringer, there would appear to be no basis whatever for the award by the Court of Claims of additional compensation, measured by interest dating from periods prior to the liquidation of the claim by the judicial determination of the reasonable royalty.

b. Neither the statutory language nor the legislative history of the provision granting the right to sue the United States for its unauthorized use of patented inventions supports an interpretation which would allow a greater recovery against the United States than against a private litigant. Under the statute (Act of June 25, 1910, as amended,

¹ It should be noted that the instant decision allows interest even prior to "the date of last infringement," a date sometimes employed before the question became settled in the *Duplate* case, and goes back to each successive year of infringement.

35 U. S. C. 68), the patent owner is entitled to recover "his reasonable and entire compensation" for the Government's infringement. In the light of the disallowance of interest on unliquidated claims against private parties, this general language, without more, can hardly be deemed to import a congressional intention to enlarge the recovery of the patent owner in his suit against the Government.

Similarly, there is no suggestion in the legislative background that such interest was contemplated by the statutory language. The original statute enacted in 1910 (36 Stat. 851), authorizing suit against the United States for patent infringement, provided for the recovery of "reasonable compensation." The only purpose of this enactment was to give the Court of Claims jurisdiction to "entertain suits against the United States for the infringement or unauthorized use of a patented invention, in certain cases, and award reasonable compensation to the owner of the patent." H. Rep. No. 1288, 61st Cong., 2d sess., pp. 1, 3. The phrasing of the measure of relief was changed to "reasonable and entire compensation" when the statute was amended in 1918 (40 Stat. 705) in order to authorize suit against the United States for the patent infringements of its contractors. This change in language, however, had no relation to the payment of interest. "The purpose of the amendment was to relieve the contractor *entirely* from liability of every kind for the infringement of patents in manufacturing anything for the Government" and

"the word 'entire' emphasizes the exclusive and comprehensive character of the remedy provided." *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331, 343 (emphasis supplied). The Court presumed that Congress intended "to secure to the owner of the patent the exact equivalent of what it was taking away from him." *Id.* at 345.

There is no indication, therefore, either in the statutory language or in the history of the legislation to support the theory that Congress intended "reasonable and entire compensation" to include interest which would not have been allowed in a private suit. On the contrary, the purpose to make the remedy against the United States "the exact equivalent" of the remedy available against a private infringer contradicts any such intention.

c. The enlargement of recovery in the instant case to include added compensation for interest was based upon the decision in *Waite v. United States*, 282 U. S. 508 (R. 86, 90), in which the Court held "that interest should be allowed in order to make the compensation 'entire' ", and expressed the view that an additional purpose of the word was "to accomplish complete justice as between the plaintiff and the United States" (p. 509). We believe that the circumstances in which the *Waite* decision was rendered, and the subsequent development of the law, justify its reconsideration at this time.²

² In the *Waite* case, the patent owner's damages were measured by his loss of profits rather than by a reasonable royalty as in the present case. This fact, however, would not seem to present a stronger case for the allowance of interest.

The holding in the *Waite* case appears to have rested in large measure upon the concession of the Government that interest should have been allowed. 282 U. S. at 508. The basis of the Government's concession, however, was that interest would have been allowed upon the recovery of a reasonable royalty in a suit for infringement between private parties. There was also a suggestion in the Government's brief that "reasonable and entire compensation" was the equivalent of "just compensation" which had been held, at the time of that decision, to include an allowance for interest in eminent domain cases. Brief for the United States, October Term, 1930, No. 103, pp. 3-7. The opinion in the *Waite* case clearly reflects the weight given the Government's concession, which was regarded as substantially equivalent to a confession of error. The question presented by this petition, therefore, has never been considered in truly adversary proceedings.

Moreover, the subsequent decisions of this Court clearly demonstrate that both grounds of the Government's concession were erroneous. We have already shown that, contrary to the Government's position in the *Waite* brief, interest on the recovery of a reasonable royalty for patent infringement will not ordinarily be allowed in non-government actions. *Duplate Corp. v. Triplex Co.*, *supra*, p. 9. Thus, "the exact equivalent" of the remedy against a private infringer, which would seem to satisfy the requirement of "complete justice" in measuring the liability of the United States (*Waite*

case, *supra*), would be a judgment which did not include interest before liquidation of the claim.

In addition, as the subsequent discussion will point out in greater detail (*infra* pp. 15-16), the recent decisions of this Court establish that even use of the phrase "just compensation" in non-eminent domain situations, in the absence of a specifically expressed intention to pay interest, will not warrant an award of interest against the Government. *United States v. Thayer-West Point Hotel Co.*, 329 U. S. 585; *United States v. New York Rayon Importing Co.*, 329 U. S. 654; *United States v. Goltra*, 312 U. S. 203.³ In these circum-

³ And even if the allowance of recovery for the Government's unauthorized use of a patent be deemed to convert that use into an eminent domain taking (see *Crozier v. Krupp*, 224 U.S. 290), "just compensation" would seem to require no more than the equivalent of the remedy available against a private infringer. The unauthorized use of a patent by the United States, however, would not seem to constitute an eminent domain taking. Before the 1910 statute was enacted such unauthorized use was regarded as a tort for which no recovery could be had against the United States. *Schillinger v. United States*, 155 U.S. 163. And decisions since its enactment continued to regard the Government's liability as that for the tort of infringement. *Keifer & Keifer v. R. F. C.*, 306 U.S. 381; *Esnault-Pelterie v. United States*, 303 U.S. 26, 28; *Bliss Co. v. United States*, 253 U.S. 187; *De Forest v. United States*, 273 U.S. 236, 240. Since the statute on its face does no more than give the consent of the United States to be sued for the tort of infringement (see *Keifer & Keifer v. R. F. C.*, *supra*), the theory of an eminent domain taking seems highly questionable. Although there were intimations of such a theory in *Crozier v. Krupp*, 224 U.S. 290 (cf. *Yearsley v. Ross*, 309 U.S. 18, 21-2), the question was not presented in that case. See *Cramp & Sons v. Curtis Turbine Co.*, 246 U.S. 28, 43-45.

stances, we do not believe that the *Waite* case should stand in the way of the Government's attempt at this time to prevent its liability from exceeding that of private persons in identical situations.

2. The decision below disregards the prohibition of 28 U.S.C. 2516 against the allowance of interest by the Court of Claims on a claim against the United States except "under a contract or Act of Congress expressly providing for payment thereof" (*supra* p. 2).⁴ The Act of June 25, 1910, as amended July 1, 1918 (35 U.S.C. 68), authorizes a patent owner to recover from the United States in a suit in the Court of Claims "the reasonable and entire compensation" for the unauthorized use or manufacture by the United States of an invention covered by a patent. The award of interest in this case, not "as interest" but "in order to make the compensation to the patentee entire or just" (R. 90), appears to be predicated upon the statutory language authorizing the recovery of "reasonable and entire compensation." The decision in *Waite v. United States*, 282 U.S. 508, upon which the court relied, is clearly based upon the use of "entire" in the legislation.

The recent decisions of this Court strongly indicate, however, that interest cannot be allowed,

⁴ Similar prohibitions have been in effect since 1863. 12 Stat. 766; 36 Stat. 1141; 42 Stat. 316; 43 Stat. 346; 44 Stat. 119 (see Judicial Code, Sec. 177, 28 U.S.C. 284).

either as interest proper or as an additional allowance to make compensation whole, in the absence of specific, unambiguous statutory language. *United States v. Goltra*, 312 U.S. 203; *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585; *United States v. New York Rayon Importing Co.*, 329 U.S. 654. The requirement of "entire compensation" would hardly seem more comprehensive than the phrase "just compensation," with its constitutional connotations, which has been held insufficient, in non-eminent domain legislation, to justify a relaxation of the explicit statutory bar against interest. *United States v. Goltra*, *supra*; *United States v. Thayer-West Point Hotel Co.*, *supra*. Furthermore, it is highly doubtful that Congress contemplated that its language would remove the existing statutory prohibition against the payment of interest, because when the statute in question was originally enacted in 1910, and amended in 1918, even the "just compensation" requirement of the Fifth Amendment had not been interpreted to include interest from the time of the taking. As late as 1920 in *United States v. North American Co.*, 253 U. S. 330, the Supreme Court held that a claimant seeking just compensation in the Court of Claims was not entitled to interest on the award from the time of the taking. Cf. *United States v. Thayer-West Point Hotel Co.*, *supra*. The allowance of interest on the basis of the statutory language, therefore, clearly conflicts with the Act's purpose and history, as well as

with the recent decisions of the Court which deny interest in the absence of a specific authorization.

3. The question is important because it is one which constantly recurs in the Court of Claims. Since the decision in the *Waite* case in 1931 many judgments have been awarded against the United States which included interest before liquidation of the claims. *Shearer v. United States*, 101 C.Cls. 196; *National Electric Sig. Co. v. United States*, 99 C.Cls. 621; *National Electric Sig. Co. v. United States*, 99 C.Cls. 646; *Marconi v. United States*, 99 C.Cls. 1, 100 C.Cls. 566; *de Simone v. United States*, 100 C.Cls. 566; *Esnault-Pelterie v. United States*, 97 C.Cls. 719; *Ordinance Engr. Corp. v. United States*, 96 C.Cls. 278; *Olsson v. United States*, 87 C.Cls. 642; *Meurer Steel Barrel Co. v. United States*, 85 C.Cls. 554; *Barlow v. United States*, 87 C.Cls. 287; *Ordinance Engr. Corp. v. United States*, 84 C.Cls. 1; *Allgrunn v. United States*, 84 C.Cls. 476; *Welin Davit & Boat Corp. v. United States*, 78 C.Cls. 772; *John Firth v. United States*, 74 C.Cls. 740; *Carley Life Float Co. v. United States*, 74 C.Cls. 682. In many of these cases, as in the present one (*supra*, p. 7), the patent owner's recovery was more than doubled as a result of the allowance of interest, although there may be no showing of fault on the part of the Government for the delay in bringing suit. In addition, the number of infringement actions which may be brought against the Government as a result of the vast amount of manufacturing activities performed for the Government in the recent war is incalculable.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH, 1949



IN THE
Supreme Court of the United States

OCTOBER TERM, 1948.

THE UNITED STATES, *Petitioner,*

v.

HAZEL L. FAUBER, *Administratrix, C.T.A.*

**BRIEF OPPOSING PETITION FOR WRIT OF
CERTIORARI.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1948.

No. 625

THE UNITED STATES, *Petitioner,*

v.

HAZEL L. FAUBER, *Administratrix, C.T.A.*

**BRIEF OPPOSING PETITION FOR WRIT OF
CERTIORARI.**

Respondent, Fauber, opposes the grant of a writ of certiorari on the petition of the United States for the following reason:

1. The Court of Claims in allowing an additional amount to be added to the award, (R. 91) ¹ did not decide any question of law in a manner inconsistent with sound principles or governing authority announced by the Supreme Court.

QUESTION PRESENTED.

The question presented in the petition (Pet.) ² is inac-

¹ Transcript of Record.

² Pet.—Petition for Writ.

curate, since it does not reflect the actual holding of the Court of Claims. The Court did not include, as part of respondent's compensation, an award of interest, *as such*, dating from the time of the infringement. Respondent submits that the question actually presented should be phrased as follows:

Whether, under a statutory authorization to sue for "reasonable and entire compensation" (35 U.S.C. 68; now 28 U.S.C. 1498) a patent owner's recovery from the United States for the unauthorized use of his invention may include, in addition to a reasonable royalty, an additional amount, conveniently determined by figuring a reasonable rate of interest, allowed, not as interest, but as part of entire and just compensation.

STATEMENT.

Suit was brought by respondent under the Statutes of 1910 and 1918, and under a Special Act of Congress, Private—No. 416—71st Congress (R. 1, 2), which Special Act, approved March 3, 1931, conferred jurisdiction on the Court of Claims and provided that "notwithstanding the lapse of time or the Statute of Limitations", the Court of Claims should "hear, examine, adjudicate, and render judgment" under the Act of 1910, and 1918 (R. 2).

The case proceeded in the Court of Claims in a not unusual manner insofar as progress was concerned. Proceedings were suspended July 1, 1942 on motion of petitioner, based on a letter from the Acting Secretary of Navy to the Attorney General dated June 27, 1942, which letter indicated it would be injurious to public interest to comply with calls made by respondent for material in the hands of the Navy Department as long as the war continued. The motion for stay was granted and not until November 16, 1945 was the case restored to active status and referred to a Commissioner (R. 77).

In view of the large number of hulls and floats (256) involved in the calls made on the Navy Department by re-

spondent, proceedings on the accounting were, of necessity delayed. Some fifty (50) hulls and floats (Exhibit 39, R. 77) were considered and finally the Court passed on twenty-six (26) types of hulls and held them to be infringements of validated claim 4 of the second patent in suit and thus within the accounting (R. 77). All of these different hulls and floats were carefully tabulated by the court (R. 77-79). Review of all the different types, and consultation and agreement with the Navy Department to winnow out as exhibits those which were to be submitted to the Court and twenty-six (26) of which were the Court held to be infringements, consumed a very considerable amount of time.

On April 10, 1942, a year after the Court of Claims had rendered its interlocutory opinion on the questions of validity and infringement, petitioner filed a motion for new trial based on alleged newly discovered evidence. By order of June 1, 1942, the court overruled the motion, stating that the alleged newly discovered evidence contained no disclosure anticipatory of claim 4 of the patent and that the Long article relied on in the motion was merely cumulative of disclosures originally before the Court and on which the findings and opinion were based. That if the Long Article had been in evidence it would not have changed the result. (R. 72, 83, Finding 22).

The Question of Diligence.

For the first time in the history of this case petitioner (Pet. 6) raises the question of delay in instituting suit. Nowhere in the proceedings in the Court of Claims was a charge of laches made. The record there, the briefs of petitioner, and the interlocutory and final hearings do not bring it up, and in the accounting proceedings before the Master no reference is made to delay in bringing suit as affecting respondent's right of recovery.

The petitioner's brief (p. 6) states "no reason appears for this delay of 15 years in institution of suit."

Plaintiff was under no rule requiring explanation for delay. The Special Act of the 71st Congress (Private—416—R. 1, 2) expressly authorized the filing of the suit and removed any disabilities of respondent because of lapse of time or statutory limitations. Congress authorized the filing of the suit, and the Government cannot now be heard to complain of the delay, deliberately excused by Congress.

However, Fauber's diligence is confirmed by the Record here. At page 60 the following letter of February 15, 1940 from the Secretary of War to the Chairman of the Senate Committee on Claims is reproduced:

"It can be said in his favor, however, that from the time he made his formal claim *Mr. Fauber showed due diligence at all times* in his efforts to accomplish settlement by negotiation.

"I am mindful of the fact that the present claimant in whose interest the bill has been introduced, *has not been guilty of laches*".*

The infringement was deliberate and willful. As early as August 8, 1917, Fauber was seeking adjustment of his claim in an effort to avoid litigation by suit against the Government, which, as a loyal citizen, he wished to avoid. He continued to negotiate the matter, but to no avail. After his death, his widow, respondent here, brought suit under the Special Act of Congress hereinbefore referred to.

The reference in the Statement (p. 6) in the Government's petition to the delay in instituting suit is completely immaterial and uncalled for, since any delay which may have occurred was specifically excused by the Special Act of Congress.

Decisions Below.

The Court of Claims, in its interlocutory opinion, made Findings of Fact and, upon those findings, announced a Conclusion of Law (R. 11-55), in an extended and well con-

* Emphasis supplied unless otherwise indicated.

sidered opinion in which a painstaking review of the patents involved and the defenses was made, and held, as a conclusion of law, that petitioner infringed claim 4 of respondent's patent No. 1,024,682, and that "under the Act of June 25, 1910, 36 Stat. 451, as amended by the Act of July 1, 1918, 40 Stat. 705, and Section 155 of the Judicial Code", respondent "is entitled to a compensation for the unauthorized use by the United States of the invention disclosed" (R. 55).

In its final opinion, on the accounting phase of the litigation (R. 73-91), the Court of Claims found that the total number of flotation units delivered during the accounting period and for which the United States, petitioner, is responsible and for which respondent is entitled to recovery, to be 2,354, having a total value of \$5,912,400 (R. 79).

In this final opinion, the Court of Claims awarded respondent $1\frac{1}{2}\%$ of the total valuation (\$5,912,400) amounting to \$88,686 (R. 84). The Court below allowed "an additional amount," calculated at 4% per annum, beginning January 1, 1918, on the award as stated in the yearly amounts set forth in finding 24 (R. 84), this additional amount "being allowed *not as interest but as a part of entire and just compensation*". (R. 85).

Respondent contended that, on the basis of the license agreement with The Electric Launch Company (R. 79 et seq.), held relevant by the Court of Claims (R. 90) over petitioner's protests, respondent was entitled to a greater percentage than the $1\frac{1}{2}\%$ given by the Court of Claims on the value (\$5,912,400) of the infringing units.

In finding 19 (R. 82) the Court, in commenting on the Electric Launch Company license, pointed out that the royalty rate there agreed on in respect of both patents, would have been 16% of the cost of the hull and that the $2\frac{1}{2}\%$ royalty rate allocated to the patent before the Court of Claims (Finding 18) thus became 8% when based on the value of the hull alone. It has been respondent's contention that the $1\frac{1}{2}\%$ by the Commission on accounting

was not commensurate in view of the percentages found by the Court to have accrued to respondent under the Electric Launch Company agreement. In support of that contention, respondent relied on the following cases decided by the Court of Claims:

"If the plaintiff has already established a royalty by a license or licenses, he has himself fixed the average of his compensation, and if that has been established prior to the infringement, the task of the Court then becomes easy." *Marconi Wireless Telegraph Co. of America v. United States*, 99 Ct. Cls. 1". *Carley Life Float Co. v. United States*, 74 Ct. Cls. 682.

These cases seem to fix the rule that an established royalty such as respondent had with Electric Launch Company establishes compensation for the use of the patent.

With respect to the question of the additional sum which the trial court allowed in the instant case which was calculated as interest, and was to be added to the main award, the Court of Claims made the following statement:

"The fifth contention of defendant is that plaintiff is not entitled to interest on the value of the Fauber invention which the Government appropriated and has used over a number of years. Interest, as such, has never been allowed in cases such as this, but under the decision in *Waite v. United States*, supra, the reasonable and entire compensation provided by the Act of 1910, as amended (35 U. S. C. 68), to a patentee includes a sum in addition to the value or reasonable royalty at the time of the appropriation and use of his invention, which, for convenience, is customarily measured and calculated at a reasonable rate of interest from the date or dates of the infringing acts. This additional amount is not added as interest but is allowed in order to make the compensation to the patentee entire or just, under the statute which authorized suit and assumed an obligation to pay reasonable and entire compensation whenever the Government manufactured or used a patented invention contemporaneously with such appropriation. Cf. *Crozier v. Krupp*,

224 U. S. 290, 304; *Olsson v. United States*, 87 C. Cls. 642; Royalty Adjustment Act, October 31, 1942 (35 U.S.C.A. 89-90); Air Corps Act of July 2, 1926, as amended by the Act of March 3, 1927 (10 U.S.C.A. 310 (i))." (R. 90).

The Court, of course, simply followed the practice approved by this Court in *Waite v. United States*, 282 U.S. 508, 509, in construing the amendment of 1918 to the Act of 1910.

The Act of June 25, 1910 did not use the word "entire", and the patent owner could sue either the Government contractor or the United States in the Court of Claims. *Wm. Cramp and Sons v. International Curtis*, 246 U. S. 28. A primary purpose of the amendment of the Act of July 1, 1918 (Chap. 114 40 Stat. 704, 705; 35 U.S.C. 68) was to confine the recovery of the patent owner to suit in the Court of Claims and to avoid interference with Government contractors by prohibiting suit against the latter. *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331.

A second purpose of the amendment of July 1, 1918 was stated, in *Waite v. United States*, *supra* to be as follows:

"In addition to the purpose of the word (entire) adverted to in *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 343, we cannot doubt that it was intended to accomplish complete justice as between the plaintiff and the United States".

Under the second or additional purpose of the Act, this Court deliberately held

"The statute grants 'recovery of his reasonable and entire compensation for such use'. We are of the opinion that interest should be allowed in order to make the compensation 'entire'."

ARGUMENT.

The "reasons" advanced by the Government for granting the writ are based upon three contentions, (1) that the allowance of "interest" imposes a greater liability for patent infringement upon the Government than the law imposes upon a private infringer; (2) that the allowance of "interest" is prohibited by Section 2516 (a) of the new Judicial Code, Title 28, U.S.C.; and (3) that the Court of Claims, in uniformly following the mandate of this Court in *Waite v. United States*, has awarded "interest" in many patent infringement cases against the Government, to the financial detriment of the United States.

We shall demonstrate that all of these arguments are without merit and fail to present any valid reason for granting the writ.

Summary of Argument.

1. The allowance of interest from the time when the infringement occurred, in private patent litigation, is specifically authorized in the statute relating to damages in patent infringement cases, now in effect and in effect when the judgment in this case was entered. (R. S. 4921, 35 U.S.C. 70; as amended August 1, 1946, Ch. 726, Sec. 1, 60 Stat. 778). Hence, the Government is in exactly the same position as a private infringer.

2. The prohibition in the new Judicial Code against interest is not an innovation in the law, but is a mere re-codification of old provisions, in effect when the *Waite* case was decided. Hence, the enactment of the new code does not justify over-turning settled practice, established and continued for many years under the old.

3. Congress has not seen fit to change, by legislation, the interpretation of the Court of Claims patent statute (35 U.S.C. 68) adopted by this Court in *Waite v. United States* and consistently followed by the Court of Claims for eighteen years. On the contrary, the statute has been re-

pealed and re-enacted, repeating the exact language upon which the interpretation was based (28 U.S.C. 1498). This re-enactment constitutes legislative adoption of this Court's previous judicial interpretation. Hence, a different interpretation at this time by this Court would be improper, as constituting judicial legislation.

I

The Government's brief in support of the petition argues that the practice of refusing an award of interest in private patent litigation was settled by this Court's decision in *Duplate v. Triplex*, 298 U.S. 448, at a date subsequent to this Court's decision in *Waite v. United States* (282 U.S. 508) allowing "interest" in patent cases in the Court of Claims; and that the Government should not be subject to greater liability for patent infringement than a private defendant.

Whatever may have been the effect of the Court's decision in the *Duplate* case on the award of interest in private litigation under the former patent statute, need not be considered, since that statute is no longer in effect, and the question is moot. The statute (R.S. 4921; 35 U.S. 70) was amended by the Act of August 1, 1946, Chapter 726, Section 1, 60 Statutes 778.

The statute, as it stood when the decision of this Court in the *Duplate* case was rendered, contained no provision for the award of interest, but was limited to "profits" and "damages" and in certain cases, provided for "a reasonable sum as profits or general damages for the infringement".

One of the specific purposes of the amendment of August 1, 1946, was to make the basis of recovery, "*due compensation*" for infringement, together with *interest from the time the infringement occurred*.

The intent of Congress clearly was to adopt for private patent litigation, the practice prevailing in the Court of Claims, since the word "compensation", which appears in

the Court of Claims statute (35 U. S. C. 68, now 28 U.S.C. 1498) was transported to the general damage statute for the first time. Moreover, the bill which resulted in the new statute (H. R. 5231, 79th Congress, Second Session) was originally entitled

"A bill to amend revised statutes 4921 (U.S.C.A. Title 35, Patents, Sec. 70) providing that damages be ascertained on the basis of compensation for infringement, *as in actions for infringement in the United States Court of Claims*".

The words, "as in actions for infringement in the United States Court of Claims" were eliminated by amendment, as unnecessary, but the original intention remained. (See report of hearings before the Committee on Patents, House of Representatives, 79th Congress, Second Session on H. R. 5231, January 29, 1946).

The report of the Senate Committee on Patents, report No. 1503, calendar No. 1529, 79th Congress, Second Session, adopted the report of the House Committee on Patents, made after hearings on H. R. 5311 (report No. 1587). The significant portion of the House Committee report, adopted by the Senate Committee on Patents, is as follows:

"The object of the bill is to make the basis of recovery in patent-infringement suits general damages, that is, any damages which the complainant can prove, not less than a reasonable royalty, *together with interest from the time the infringement occurred*, rather than profits and damages."

The following specific language in the Act as approved makes this intent manifest:

"* * * the complainant *shall be entitled* to recover general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, together with such costs, *and interest*, as may be fixed by the Court. The Court may in its discretion award reasonable attorneys fees to the prevailing party upon entry of judgment on any patent case."

The original bill (H.R. 5231) employed the following language:

"* * * the complainant shall be entitled to recover general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, together with his costs and *expenses* and *interest* from the time the infringement began."

After the hearings before the House Committee on Patents, this language was amended to read:

"* * * the complainant shall be entitled to recover general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, together with his costs and reasonable attorney's fees *to be fixed by the Court* and interest from the time the infringement occurred."

The hearings show that the original expression "*expenses*" was thought to be too general and indefinite, and the words "*attorney's fees to be fixed by the Court*" were substituted.

In the Senate, the language was amended to read as quoted above, p. 10, to make it clear that the award of attorney's fees was *discretionary* with the Court.

It is clear from the legislative history, that it is mandatory for the Court to fix the costs *and interest*, but that the award of attorney's fees is discretionary with the Court.

The report of the Senate Committee on Patents said:

"By the second amendment the provision relating to attorney's fees is made discretionary with the court. It is not contemplated that the recovery of attorney's fees will become an ordinary thing in patent suits, but the discretion given the court in this respect, in addition to the present discretion to award triple damages, will discourage infringement of a patent by anyone thinking that all he would be required to pay if he loses the suit would be a royalty. The provision is also made general so as to enable the court to prevent a gross injustice to an alleged infringer."

No change respecting the award of interest from the time the infringement occurred was intended by the amendment. This is clear from the fact that no mention thereof was made in the report and from the fact that the Senate Committee adopted the report of the House Committee on Patents, which stated that the object of the bill was to make the basis of recovery "general damages * * * together with interest from the time the infringement occurred * * *."

This is the exact basis of the recovery awarded by the Court of Claims in the present case. Hence, the Court did *not* allow "a greater recovery against the United States than against a private litigant", as alleged in the Government's petition, p. 10, but allowed exactly the same recovery as the law prescribes in private litigation.³

The entire argument in the Government's brief, based upon *Duplate v. Triplex, supra*, falls, in view of the change in the statute since the date of that decision.

The Government attacks this Court's decision in the *Waite* case on the contention that it was based upon a *concession* by the Government that interest should have been allowed; and that the concession was based on a belief that, in private litigation, interest would have been allowed. We have demonstrated, above, that such a concession today would be entirely justified, since the statute (35 U.S.C. 70) as amended, specifically provides for the allowance of interest in private litigation.

However, it seems fantastic for the Government to argue that this Court, in the *Waite* case, based its ruling on a concession by the Government, in complete disregard of applicable legal and equitable principles. The ruling dealt

³ The Act of August 1, 1946 was in effect when the judgment in this case was entered on December 6, 1948. The act provided "this act shall take effect upon approval and shall apply to pending causes of action in which the taking of the testimony has not been concluded * * *". The act was approved August 1, 1946. The testimony on the accounting in this case was taken on January 20, 21, 22 and 27, 1947 and the evidence on both sides was closed January 27, 1947. (R. 94-97)

with the case on the facts presented and the law having to do with such a state of facts. It is absurd to contend that, since the Government conceded certain legal principles, the Court had nothing to do but decide in favor of the claimant. It is submitted that this Court looks beyond any such concessions or admissions and interprets the statutes and applies the law in order to do justice to the litigants. The argument that the concession by the Government in the *Waite* case was the controlling thing, is without weight.

In *Phelps v. The United States*, 274 U.S. 341, this Court held that:

"* * * Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. *Seaboard Air Line R. Co. v. United States*, 261 U. S. 306 (67 L. Ed. 669, 43 Sup. Ct. Rep. 354); *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 123, 68 L. Ed. 934, 941, 44 Sup. Ct. Rep. 471; *Liggett & M. Tobacco Co. v. United States*, 274 U. S. 215, ante, 1006, 47 Sup. Ct. Rep. 581." *Phelps v. United States*, 274 U. S. 341, 344.

These rulings, supporting the finding of the Court of Claims for the additional amount to be added to the award, have not been overruled by any later decisions of this Court dealing with a similar state of facts. Petitioner relies on the case of *United States v. Thayer-West Point Hotel*, 329 U. S. 585 in which case the Court of Claims allowed inter-

est at 4% per annum. The Supreme Court reversed that decision, relying on Paragraph 177 (a) of Judicial Code. This decision is not applicable to respondent's case. In *United States v. Thayer*, there was a contract between the United States and respondent for hotel property which provided for lease of the property on which the hotel was erected for the benefit of the Military Academy. The lease was assigned and Thayer took the property. In 1943, the lessee found operation of the hotel impossible and, in accordance with the provisions of the lease, promptly turned the property over to the Government. In the case of respondent, the property was unlawfully taken and used by defendant. There was no question of contract under which the parties acted, as in the West Point Hotel case.

In *United States v. New York Rayon Importing Company, et al*, 329 U. S. 654, the Court of Claims awarded interest and this Court held that it should not have been allowed. In the Rayon case, the suit was for a refund of customs collections paid under protest. There was no taking of property, as in the instant case, but merely a claim for a refund. That refund was made, but interest was disallowed. There is a clear distinction between these cases and respondent's case, and the decision in the *Waite* case is still the rule.

The decision in *United States v. Goltra*, 312 U. S. 203, did not overrule the decision in the *Waite* case. In the *Goltra* case, compensation was awarded under a special act for the taking by the Government of property owned by it but leased to the claimant. The act said nothing about interest and this Court held that it could not be allowed. The Court distinguished from *United States v. Creek Nation*, 295 U. S. 103 and *Sho-Shone Tribe v. United States*, 291 U. S. 476, in both of which cases there was a special jurisdictional act, although in neither one of these cases was interest mentioned. In the *Goltra* case, the Court did not overrule the principle upon which interest had been awarded as part of just compensation in the *Creek Nation*

and *Sho-Shone Tribe* cases, both based on special acts, with no mention of interest.

In the instant case, based on a special act not mentioning interest, the Court of Claims followed the rule in *Waite* and awarded an additional amount to make complete and entire the compensation.

With respect to the decisions relating to private patent litigation, on which petitioner relies and sets up on page 9 of the petition, it would seem that insofar as *Mowry v. Whitney*; *Tilgham v. Proctor*; and *Crosby Valve Company v. Safety Valve Company* are concerned, they can hardly serve as precedents against the later decision in the *Waite* case, dealing specifically with a patent infringement claim against the Government.

II

The second reason advanced by the Government for the allowance of the writ is that Section 2516 of the new Judicial Code, 28 USC, prohibits the allowance of interest.

The new Judicial Code, Section 2516, effective September 1, 1948, did not change the substantive law, as to interest, but simply constituted a reenactment of the law previously in effect, and under which the award of an additional amount, not as interest, but to make the patent owner's compensation "reasonable and entire" was specifically authorized in the *Waite* case. Footnote 4 at page 15 of the petition acknowledges that similar prohibitions against the award of interest, as such, have been in effect since 1863.

Former Section 284 of Title 28 USC (1940 ed.) provided

"(a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in Subdivision (b)."

Subdivision (b) and former Section 284 of 28 USC provided for interest in certain cases of overpayment under

the Internal Revenue law and similar provisions were found in Section 3771 of Title 26 USC. Hence, in the revision of the Judicial Code in 1948, reference to these sections was omitted and the following language substituted

“* * * or act of Congress expressly providing for payment thereof.”

As showing that no change in substance was made by the enactment of Section 2516 of Title 28 USC, the following is quoted from the Reviser's Notes, appearing at page 1925 of Title 28, United States Code, Congressional Service, pages 1487-2174, 80th Congress—Second Session, published by West Publishing Co. and Edward Thompson Co.

“Section 2516—Section Revised

“Based on Title 28 USC, 1940 ed., Section 284 and Section 226 of Title 31, USC 1940 ed., Money and Finance * * *

“Subdivision (b) of section 284 of title 28 USC, 1940 ed., was omitted as covered by section 3771 of title 26, USC, 1940 ed., Internal Revenue Code. Such omission required the exception in subdivision (a) of such section 284, reading: ‘except as provided in subdivision (b)’, to be changed to read: ‘or Act of Congress expressly providing for payment thereof’.

“Subsection (b) of this section is based on the last sentence of section 226 of title 31, USC, 1940 ed., Money and Finance.

“Changes were made in phraseology”.

Thus, the law has not changed since 1931, when Justice Holmes rendered the unanimous decision of this Court in the *Waite* case, holding that the Act of 1910, as amended in 1918 (35 USC 68) authorized the award of an additional percentage over and above the principal sum, not as interest, but as a part of entire and just compensation.

III

The Government seeks reversal of the practice authorized in the *Waite* case on the contention that the Court of

Claims has uniformly followed the *Waite* decision and will continue to do so in the future, to the financial detriment of the Government. This, of course, is not a valid "reason" for granting the writ; but would be a matter for legislative action by Congress, if Congress should agree with the Government's contention that the liability for patent infringement should be less than prescribed by the *Waite* decision.

Instead of taking steps to change the doctrine of the *Waite* case, or otherwise lessen the liability of the Government for patent infringement, Congress has specifically ratified, by legislative action, the rule of the *Waite* case and the settled practice adopted by the Court of Claims thereunder.

By the Act approved June 25, 1948, effective September 1, 1948, Chapter 646, Special Law 773, the former statutes giving the Court of Claims jurisdiction in suits against the United States for patent infringement (35 U.S.C. 68) were repealed and were re-enacted as Section 1498 of the new Judicial Code, Title 28 U. S. C.

The old law is quoted at pages 2 and 3 of the Government's Petition in this cause and need not be repeated, except to note that the statute provided that the patent owner's

"remedy shall be by suit against the United States in the Court of Claims for the recovery of his *reasonable and entire compensation* for such use and manufacture; * * *."

Section 1498 of the new Judicial Code specifies

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States for the recovery of the *reasonable and entire compensation* for the use or manufacture of an invention covered by a patent of the United States which has been used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same."

It is a fundamental principle of statutory interpretation that the re-enactment by Congress of particular language in a former statute constitutes a legislative enactment of the interpretation given to that language by the court in the intervening period.

In the *Waite* case the Court said:

"The statute grants 'recovery of his reasonable and entire compensation for such use'. We are of the opinion that *interest should be allowed* in order to make the compensation '*entire*'."

The Court of Claims has uniformly followed the rule of the *Waite* case, in the decisions cited at page 17 of the Government's Petition.

Petitioner, as pointed out, persists in referring to the added amount "as interest." It is not *interest*. This Court and other Courts have so announced in the cases referred to. Calculating interest is merely a convenient method of arriving at a figure which will make compensation just, reasonable, and entire. (*Seaboard Air Line Co. v. United States*, 261 U. S. 299, at 306).

At one time 6% was the percentage used. In *Shearer v. United States*, 101 Ct. of Cls. 196, 5% was adopted. In respondent's case 4% has been given. Whatever the varying rate, this Court and the lower Courts have always computed the additional amount in this manner to give the successful claimant full measure of recovery.

Petitioner (Pet. 17) expresses concern over the fact that the added amount exceeds the award. This is idle argument. The fact that there has been such an accretion is not respondent's fault. Had Fauber's earnest and unceasing efforts to negotiate a settlement been entertained, suit would not have been necessary and the additional amount, if any, would have been nominal. In all such cases it has never been the practice of the Courts to penalize the successful litigant because of the inevitable delay in final judicial disposition of the case.

When Congress re-enacted the identical language in the new Judicial Code, effective September 1, 1948, it adopted the judicial interpretation of the language, and gave it statutory force.

In *The Dollar Savings Bank v. United States*, 86 U.S. 227, 241, October 1873, this court said:

“* * * It is, doubtless, a rule that when a judicial construction has been given to a statute, the re-enactment of the statute is generally held to be in effect, a legislative adoption of that construction.”

In *John H. Sessions v. John M. Romadka et al*, 145 U.S. 29, 52, October 1891, this court said:

“* * * Congress having in the Revised Statutes adopted the language used in the Act of 1837, *must be considered to have adopted also the construction given by this court to this sentence, and made it a part of the enactment.*”

In *John C. Heald v. District of Columbia*, 254 U.S. 20, 22, 65, L. ed. 106, 111, October 1920, this court held:

“In addition, as the paragraphs of Sec. 250 in question but re-enact provision of prior statutes which had been construed as conveying authority to review controversies concerning the constitutional power of Congress to enact local statutes (*Parsons v. District of Columbia*, 170 U.S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Smoot v. Heyl*, 227 U.S. 518, 57 L. ed. 621, 33 Sup. Ct. Rep. 336), the proposition conflicts with the settled rule that *where provision of a statute had previous to their re-enactment, a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary.*”

In *Benjamin F. Johnson v. Manhattan Railway Company*, 289 U.S. 479, 500, 77 L. ed. 1331, 1346, October, 1932, this court held:

“The practice of the Senior Circuit Judges here described and the decision just mentioned amounted to

a practical construction of the provision in question in keeping with its literal meaning. In 1922, after that construction had prevailed and been acted on for several years, the provision was re-enacted by the Congress as part of an act dealing with other assignments of judges to the District Courts. The reenactment was without any change indicative of a disapproval of the prior construction by the Senior Circuit Judges. In such circumstances, as this Court often has pointed out, reenactment operates as an implied legislative approval of the prior construction—in other words, as a *reenactment of the statute as before construed.*”

To the same effect are the following decisions of this court:

United States v. Catharine I. Gillis, 95 U. S. 503, 505, 506; *United States v. Charles Bowen*, 100 U. S. 631, 632; *Richard C. Greenleaf v. John Z. Goodrich*, 101 U. S. 845, 846; *New York, New Haven, & Hartford Railroad Company v. Interstate Commerce Commission*, 200 U. S. 402, 50 L. ed. 525; *Copper Queen Consolidated Mining Company v. Territorial Board of Equalization of the Territory of Arizona*, 206 U. S. 474, 479, 51 L. ed. 1143, 1147; *George S. Latimer v. United States*, 223, U. S. 501, 504, 56 L. ed. 526, 527; *M. Anderson v. Pacific Coast Steamship Company*, 225 U. S. 187, 198, 56 L. ed. 1047, 1053; *United States of America v. Edward Ryan*, 284 U. S. 167, 175, 76 L. ed. 224, 228; *Old Colony Railroad Company v. Commissioner of Internal Revenue*, 284 U. S. 552, 557, 76 L. ed. 484, 487; *Corinne S. Koshland v. Guy T. Helvering*, 298 U. S. 441, 445, 80 L. ed. 1268, 1272, 1273; *United States of America v. Elgin Joliet & Eastern Railway Company*, 298 U. S. 492, 497, 80 L. ed. 1300, 1301; *State of Missouri v. John T. Ross*, 299 U. S. 72, 75, 81 L. ed. 46, 49.

The foregoing cases demonstrate a deliberate intent by Congress to adopt the doctrine of the *Waite* case as positive legislation, when the language of the Act of 1910, as amended in 1918 (35 U. S. C. 68) was re-enacted in the new

Judicial Code, Title 28, Section 1498, since that doctrine was well established, had been in effect for nearly eighteen years and had been consistently followed by the Court of Claims, as asserted in the Government's petition, page 17. Hence, the third reason advanced by the Government for the issuance of the writ, in fact, constitutes a controlling reason for its refusal.

CONCLUSION.

It is submitted that the petition for writ of certiorari should be denied.

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